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THE COLLECTIVE BARGAINING AGREEMENT AND ITS LEGAL EFFECTS

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Within the past decade by statutory enactment and with the support of public opinion, labor has achieved the long-sought-after right to bargain collectively. It is for this right, together with the recognition of unions as proper bargaining agents, that labor has carried on its industrial warfare in recent years, and yet the right to bargain collectively is itself of importance only in so far as it results in an agreement creating legal rights and obligations between employers and their employees.

The significance of the collective labor agreement is naturally of importance to employers and their workers, but the public as a whole has an equally vital interest in the matter. The strike and its picket line, the lockout and the blacklist all create economic waste ultimately borne by the public. The concurrent disruption of industrial life and the imminence of violence and bloodshed suggest the value of industrial peace to the community, and this is particularly true in wartime, when the utmost possible elimination of interruptions in production becomes a matter of urgent national concern. The collective agreement, representing the culmination of bargaining between two substantially equal economic groups, offers perhaps the best method of establishing stability in the employer-employee relationship. In the analysis, then, of the problems created in the attempted enforcement of these agreements, the effect that their interpretation will have upon all three groups—laborers, employers, and the public—must be considered. It is with this in mind that we undertake to outline the problems relating to the legal validity of the collective labor agreement. It must be recognized, of course, that many developments in the law relative to the nature and effect of collective bargaining agreements will be more or less frozen for the duration of the war, with final decisions on many important questions held temporarily in abeyance until the emergency is over.

The history of the development of these collective agreements from the status of merely moral undertakings to that of legally enforceable contracts presents the picture of the courts struggling to find some appropriate juristic concept to serve as a basis for dealing with this new type of economic behavior. Confronted with a form of group conduct

which, although possessing many of the attributes of familiar relationships, entailed other more complicated factors, the courts have striven to apply familiar common law principles. The floundering of the courts in their search for a solution is exemplified by the descriptive terms used in relation to these agreements, such as the declaration that:

> "An agreement upon wages and working conditions between the managers of an industry and its employees, whether made in an atmosphere of peace or under the stress of strike or lockout resembles in many ways a treaty."[1]

Illustrative of this same confusion are judicial statements that such agreements are continuing offers to be accepted by the individual employees,[2] or that they create usages and laws of the industry,[3] or more modernly, that they are contracts.[4]

A collective bargaining agreement is characterized principally by the essential fact that one of the parties is a collective group representing a body of employees, that is, the union. The other party to the understanding, representing the employer, may be either an individual employer or a collective group, an employers' association. The agreement is primarily concerned with working conditions and may cover a wide-variety of subjects ranging from the more normal provisions as to hours and wages to elaborate stipulations for methods of arbitration, shop grievance committees, apprentices, closed shops, and restrictions on the right to deal with non-union employers. These agreements also often include clauses covering the termination, modification, and renewal of the contract; provisions for sanitation and for the safety of the workers; covenants against strikes and lockouts; stipulations as to discharge, transfer, and lay-off; and the extremely important and essential recognition of the union as the bargaining representative of the employees.[5]

Although the various provisions of these agreements offer certain difficulties in interpretation because of their technical nature, nonetheless, the main problem is to determine the exact legal effect of the agreement in its entirety. It is with this problem that this paper is mainly concerned.

A collective labor agreement bears directly upon the rights and interests of at least three classes, and in some circumstances four. There is, first, the individual employee: Does he obtain any rights under the agreement? Does it operate to restrict his conduct or impose liability upon him? There is also the union: Is it bound by this

[1] Yazoo & M. V. R. Co. v. Webb, 64 F. (2d) 902 (C. C. A. 5th, 1933).
[2] Rentschler v. Missouri Pacific R.R. 126 Neb. 493, 253 N. W. 694 (1934).
[3] Hudson v. Cincinnati, New Orleans & Texas Pacific Railway, 152 Ky. 711, 154 S. W. 47 (1913).
[4] Yazoo & M. V. R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931).
[5] *See* 1 C. C. H. LABOR SERVICE (3d ed.) ¶ 611 *et. seq.* for illustrations of some collective agreements.

understanding? Has it obtained rights enforceable against the employer? Can an unincorporated association either secure enforceable rights or subject itself to duties under the agreement? Finally, there is the employer with similar problems and questions to be answered, and in certain circumstances there is the additional factor of an employers' association.

The courts, in their first attempts to ascertain the exact nature of these agreements, were primarily impressed by the inability of a voluntary unincorporated association to enter into a binding contract. Since the union could not be viewed as a legal entity, it seemed to follow logically that the stipulations signed by it could have no legal effect as between the parties. Furthermore, as a general rule there was no specific undertaking by individual employees to work for definite periods of time, and as a result it was held that there was no one actually obligated by the agreement and, in fact, no consideration for the employer's promises. Therefore, the courts in the early cases often referred to such undertakings as being morally binding upon the employer and the union, or as mere gentlemen's agreements without any legal validity. Under such an approach the agreements were, of course, entirely ineffectual, and the parties to the contracts, as well as the public, were deprived of their benefits.

As time went on, however, and resort to the courts to enforce these agreements became more frequent, new approaches were devised by which some validity could be given to them. The usage theory was first suggested, then the agency doctrine, and today, with ever increasing acceptance, the contract approach.

The Usage Concept:

The usage theory is predicated on the doctrine that no contract has been formed between the union and the employer but that it merely creates a law of the industry.[6] The leading case expressing this rationale is *Hudson v. Cincinnati, New Orleans & Texas Pacific Railway*[7] in which the court, unable to find consideration for the employer's undertaking, held that the collective agreement merely established trade usages. A usage, as defined by the court,

> "* * * refers to 'an established method of dealing, adopted in a particular place, or by those engaged in a particular vocation or trade, which acquires legal force, because people make contracts in reference to it.' "[8]

[6] Yazoo & M. V. R. Co. v. Webb, *supra* note 1. Although it is possible to hold that there is a contract between the union and the employer, and that it in addition creates a usage which will limit the power of the individual employees to contract, such an approach does not seem to have been used by the courts.

[7] *Supra* note 3.

[8] The definition was taken from a statement in Byrd v. Beall, 150 Ala. 122, 43 So. 749 (1907).

Under the theory announced in this case, the only contracts which create any legal rights are the individual contracts of employment entered into separately by each worker. The result of this doctrine is the repudiation of any collective right and the recognition only of a group of separate contracts, whose terms are limited by the usages set up in the collective agreement.

The theory itself, however, presents numerous logical difficulties. The courts have been unable to agree on the question of the necessity for express adoption of the agreement by the employee. If the agreement creates a usage as commonly understood in the law of contracts, mere knowledge of its existence, without express adoption, will be enough to permit a court to read such custom into the individual employment contracts, unless there is some showing of an inconsistent purpose.[9] Some courts, adhering strictly to this normal contractual approach, have held that the usages established in the collective agreement will be read into all individual employment contracts entered into with knowledge of the collective agreement and without express repudiation thereof.[10] Not all courts, however, have accepted this view, for some have required an express adoption of the usage before it will be treated as a term in the individual contract.[11] Such an approach seems difficult to justify or to reconcile with the basic rules as to usages.

The modification of the agreement is another aspect of the problem which suggests further conceptual flaws in this theory. To be effective and useful, it is vital that the collective agreement be flexible, subject to change and alteration, and yet the very essence of a usage is its stability and long accepted use.[12] Since the problem of modification introduces other factors, it will be discussed in detail later, but it is mentioned here to indicate the weaknesses of this approach by the courts.

The most fundamental criticism of the usage doctrine, however, is directed at its failure to recognize any collective right or liability. The union in its own capacity is unable to enforce the terms of the agreement and must rely upon the initiative of each individual employee to enforce its provisions. Likewise, the employer is given no assurance of stability

[9] 1 RESTATEMENT, CONTRACTS §§ 247 and 248 (1931).

[10] Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S. W. (2d) 692 (1928).

"We think the legal effect of the agreement between the operators and the miners is that it became a part of and formed the basis of the contract of employment between each operator accepting it and each of the employees, who entered or continued in his service and employment of such employer with knowledge of its execution, and in the absence of any express contract between the individual employee and his employer inconsistent with the terms of the agreement." p. 694.

[11] Burnetta v. Marceline Coal Co., 180 Mo. 241, 79 S. W. 136 (1904), where the theory was applied to allow the employee to recover. Hamilton, *Individual Rights Arising from Collective Labor Contracts*, 3 MO. L. REV. 252 (1938).

[12] Anderson, *Collective Bargaining Agreements*, 15 ORE. L. REV. 229 (1936); Hamilton, *supra* note 11.

in his labor relations since he has no power or right to enforce the contract against the union.

In discussing the rights created by collective agreements, further mention will be made of the usage doctrine, and its validity will be compared with the other accepted approaches.

The Agency Theory.

Still burdened with the view that the union was unable to contract for itself, some courts adopted the agency theory as a method of giving some effect to collective bargaining agreements. As under the usage doctrine, there is no contract relationship between the union and the employer but solely between the employer and his individual employees. The union is merely the agent in forming the contract, the principals being the individual employees.[13]

This theory has not found very general acceptance, probably because of the practical difficulty in establishing the agency relationship, especially where an employee is not a member of the union or joins after the understanding is effected. Furthermore, if the employee is a member of the union and specifically voted against the provision, it is purely a fiction to hold that the union was an authorized agent acting for the employee.[14]

This doctrine has been dismissed in the following summary manner.

> "It has never been of any importance in the development of these individual rights, for no case has ever protected such rights in reliance upon it. Without support either in logic or authority, it is not the law and should not be."[15]

The Third Party Beneficiary Theory:

Of recent years another analysis has been made of these collective labor agreements differing radically from the two prior theories in that it is based upon the assumption of a valid contract between the employer and the union and a recognition of the juristic personality of the latter. The agreement is termed a third party beneficiary contract giving rights to the individual employee as the beneficiary thereof.[16] This doctrine is more satisfactory than the other two discussed above, since it does recognize the collective rights, but it is still not an adequate solution in all circumstances. Its greatest deficiency lies in the failure to find any theory by which the employer may enforce the contract against an individual employee. Since the latter is not a party to the contract, and since as yet there is no theory of a third party obligor,

[13] One of the most cited cases illustrating this theory is Mueller v. Chicago & N. W. Ry. Co., 194 Minn. 83, 259 N. W. 798 (1935).

[14] Note (1932) 41 YALE L. J. 1221; note (1931) 31 COL. L. REV. 1156.

[15] Hamilton, *supra* note 11.

[16] Yazoo & M. V. Railway Co. v. Sideboard, *supra* note 4. *Also see* Gulla v. Barton, 164 App. Div. 293, 149 N. Y. S. 952 (1914); (1941) Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Hill. Washington has recognized this doctrine in Huston v. Washington Wood & Coal Co., 4 Wn. (2d) 449, 103 P. (2d) 1095 (1940).

he is apparently under no liability.[17] However, this objection would seem to be of little real importance. The interest of the union in the agreement would appear to be sufficient to cause it to exercise disciplinary power over its members, thereby forcing them to conform to the agreement. The non-union worker would present more of a problem, but even this difficulty is minimized by the growth of closed shop and preferential hiring agreements.

Briefly, then, the usage, agency, and third party beneficiary doctrines have all been applied by the courts to give collective labor agreements some validity. The exact effect of each of these three rationales will be developed in detail in a discussion of the rights and duties of the various parties. The important fact is that the courts are now, by one device or another, enforcing these agreements.

THE RIGHTS OF INDIVIDUAL EMPLOYEES

Right To Damages:

From the standpoint of the individual employee, the fact that an agreement is accorded legal significance is only important as it affects his own rights and liabilities. He is primarily interested in determining whether or not he himself may enforce the contract against his employer if the latter discharges him in violation of the agreement or pays him less than the wage stipulated therein. Or in more practical terms, he is interested in knowing whether or not he can obtain compensation for the loss which he suffers because of his employer's breach of the contract.

While there have been a few decisions like that in *Kessell v. Great Northern Ry Co.*,[18] which recognized the existence of a valid contract between the employer and the union but denied the right of an employee to sue individually, the majority of courts have recognized the right of the employee to bring suit to enforce these contracts. Of course, if the usage or agency doctrine is applied the problem is simplified, for the suit is not upon the collective agreement but upon the separate contracts of employment.[19] Suits for damages are now generally successfully prose-

[17] Anderson, *supra* note 12; Hamilton, *supra* note 11. *But cf.* Whiting Milk Co. v. Grondin, 282 Mass. 41, 184 N. E. 379 (1933), in which the employer sued an employee for violating a provision of the agreement requiring him, upon termination of his employment, to refrain from selling milk to the employer's customers for a period of ninety days.

[18] Kessell v. G. N. Ry. Co., 51 F. (2d) 304 (W. D. Wash., 1931). This case relied upon Young v. Canadian Northern Ry., A. C. 38, 144 L. T. 255 P. C. (1931), which denied the propriety of suit by an individual employee and held that the method of enforcement was through a strike by the union. However, it is possible that the *Kessell* case would recognize the validity of a suit by the union to enforce the contract. In some jurisdictions where the usage doctrine is still applied, it may be necessary for an employee to show an express adoption of the terms of the collective agreement before those provisions will be treated as incorporated into his individual employment contract.

[19] Yazoo & M. V. R. Co. v. Webb, *supra* note 1; Hudson v. Cincinnati, New Orleans & Texas Pacific Railway, *supra* note 3.

cuted by individual workers, and this form of relief has proved a fairly adequate remedy in cases where an employer has refused to pay a stipulated wage. Under any of the three theories it is possible to allow recovery for the difference between the amount paid and the agreed compensation.[20] The main differences arise in the event the employer contends that there has been a modification of the agreement.[21]

Damages have also been recovered for wrongful discharge,[22] although some courts, applying the usage theory, have denied recovery.[23] Under this latter doctrine, since the only contract is the individual contract of employment which the employee can terminate at will, the courts have refused to penalize the employer for exercising a similar power by discharging the worker. This is merely one illustration of the failure on the part of the courts to realize the actual effect of the collective bargain.

The more difficult problem in relation to the right to damages is the measure to be used to determine the loss in any particular case. If the suit is merely for the stipulated wage which the plaintiff was entitled to under the contract, it is fairly simple to allow a suit for the difference between the wages which he was paid and those provided for.[24] More complicated questions arise when the suit is for damages for wrongful discharge or non-recognition of seniority rights, with the concomitant failure to be recalled to work. Since there is seldom any provision requiring employment for a definite period of time, it becomes almost impossible actually to compute the amount lost by the employee. However, it is certain that whatever the loss, the courts will require the employee to mitigate his damages by attempting to find re-employment.[25]

Right to Equitable Relief:

Damages, even when allowed, have not proved to be adequate compensation in all situations. As a result, employees have turned to equity,

[20] *See* Gulla v. Barton, *supra* note 16, and McNeill v. Hacker, 21 N. Y. S. (2d) 432 (1940) in which the third party beneficiary doctrine is applied to allow recovery. *Also see* United States Daily Publishing Corp. v. Nichols, 32 F. (2d) 834, (C. C. A., D. C., 1929), an example of a true usage or custom.

[21] The problem of modification is discussed at page 189 *et seq.*

[22] *See* Cross Mountain Coal Co. v. Ault, *supra* note 10 (usage); Mueller v. Chicago & N. W. Ry. Co., *supra* note 13, where, although recovery was denied on the particular facts, the propriety of the type of suit was recognized under the agency theory; Gary v. Central of Georgia Ry. Co., 37 Ga. App. 744, 141 S. E. 819 (1928); Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Hill, *supra* note 16.

[23] Swart v. W. P. Huston, doing business as Kansas Theatre, 4 LABOR CASES ¶ 60, 714 (1941); Hudson v. Cincinnati, New Orleans & Texas Pacific Railway, *supra* note 3.

[24] That is the procedure which was followed in cases such as Gulla v. Barton, *supra* note 16.

[25] Hamilton, *supra* note 11. The writer also suggests the difficulty in handling the case of non-recognition of seniority rights. There is some question as to whether such action is to be treated as a complete breach of the entire contract.

asking for specific performance of these agreements. The equity courts were at first reluctant to issue injunctions in this type of case. The old equitable doctrines of refusal to require performance of personal service contracts, and the need for unique types of labor and for mutuality of obligation or remedy were all difficulties which had to be overcome. Gradually, however, the courts began to allow the desired relief. This remedy has been resorted to most often in cases involving the reinstatement of seniority rights[26] and the rehiring of employees wrongfully discharged.

Closely related to the injunction is the use by individual employees of the declaratory judgment. Such proceedings have been employed to establish the seniority rights of an employee under an agreement[27] and to determine whether or not the employer is required to pay union wages upon a particular job.[28] This procedure can, of course, be used generally to determine the validity of any particular provision in a collective agreement, such as a closed shop clause. While the greater number of jurisdictions now seem to recognize that collective labor agreements do give to the individual employee certain rights which he may enforce judicially, there still remains the question as to which employees may avail themselves of these rights. Is it necessary that they be members of the union before they are afforded the benefits of the agreement, or is it sufficient if they are simply employees of the employer with whom the collective contract has been made?

The Nature of the Employee's Rights:

It would seem to be fairly simple to extend the individual rights existing under the collective contract to the non-union laborer, once it is recognized that the union member has such rights. Clearly, if the usage theory is applied, the question as to whether a worker is a union member would have little relevancy, the important question being whether he had knowledge of the existence of the usage and contracted with reference to it.[29]

In jurisdictions recognizing the third party beneficiary rationale, the problem is one of determining the particular class of employees intended to be benefited by the agreement. Since the union's aim of maintaining a set of standards throughout an industry is fostered by extending the benefits thereof to all workers, it is logical to assume that the parties to the agreement intended such a result, unless there is some express language negativing such a conclusion.[30]

[26] Dooley v. Lehigh Valley R. Co. of Penn., 130 N. J. Eq. 75, 21 A. (2d) 334 (1941); *Note* (1938) 51 HARV. L. REV. 520.

[27] Burton v. Oregon-Washington R. & Nav. Co., 148 Ore. 648, 38 P. (2d) 72 (1934), recognized the availability of a declaratory judgment, but relief was denied on the facts.

[28] Key v. George E. Breece Lumber Co., 4 N. M. 397, 115 P. (2d) 622 (1941).

[29] Yazoo & M. V. R. Co. v. Webb, *supra* note 1.

[30] Yazoo & M. V. R. Co. v. Sideboard, *supra* note 4. This case and the Webb case cited in note 29 are of especial interest since the employee con-

It is much more difficult, if not impossible, to allow a non-union employee to sue if the agency doctrine is applied. The basis for finding agency is membership in the union rather than the status of employee. There is nothing upon which the agency can be based if the plaintiff is a non-union worker, which illustrates another weakness of this doctrine. It is possible, of course, to evolve some theory of ratification or adoption of the contract, but such an approach is hardly realistic.

The exact nature of the individual employee's rights must also be considered, and this involves, generally, the problem of modification of the agreement. Can the union modify the contract in such a way as to destroy the employee's rights? If the third party beneficiary approach is used to uphold the agreement, applying strict contract rules, the worker's rights under the contract have become vested, and can not be modified without his consent. Thus the Washington court has stated:

> "After a contract for the benefit of a third person has been accepted or acted on by such third person beneficiary, the contract can not be rescinded by the parties without his consent."[31]

Under the usage theory, however, it is possible to hold that the agreement can be modified by the original parties. The new usage thus created will in turn become a part of each worker's contract of employment if the employee continues in his employment with knowledge of it. This again presents the inconsistency, noted earlier, of attempting to modify a usage which is predicated upon stability and long-term use.[32]

The agency approach also fails to suggest any method by which the agreement may be modified by the union without the consent of the employee, the former's principal. There is a possibility in this situation, however, of holding that the members of a union consent in advance to any modification agreed to by the majority.[33]

The need for flexibility in these agreements should not be overlooked, since the union must have the right to alter the provisions for the benefit of the workers as a whole, as it would be highly undesirable to freeze existing labor conditions for long periods. The courts, often without too much theoretical justification, have apparently upheld the power

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cerned was a colored non-union worker unable to become a member of the union. They both arose out of identical factual situations, and the difference in result may be explained on the basis of the difference in the approaches used. A difficult problem is suggested in a Note (1941) 41 COL. L. REV. 304, namely, what should be done where the employee who attempts to obtain the benefits of the agreement is a member of a rival union? May he still claim that the contracting parties intended to benefit him? The author of the Note also raises the question whether an employee who has given up his membership in the contracting union can still claim rights under the collective agreement.

[31] Huston v. Washington Wood & Coal Co., *supra* note 16.

[32] See page 184, *supra*.

[33] Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L. J. 195 (1938).

of the union to modify the collective agreement. The general basis of the welfare of all workers has been suggested as a justification by some courts.

> "The brotherhood had power by agreement with the railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all members."[34]

Other courts have merely found that the union possessed this power because it was a party to the contract.

> "The transaction is an agreement between an employer and a labor union designed by the latter to benefit itself and those members who enter the employer's service. The employees stands no higher than the union. If it modifies the agreement with the employer, the employee must acquiesce. In no correct sense is the union an agent. It is principal."[35]

Such an approach is antipathetical to any doctrine of the existence of vested rights in the individual employee.

This right of the union to alter the contract has occasionally been repudiated.[36] Thus in the case of *Ahlquist v. Alaska Portland Packers Ass'n*,[37] oral modifications entered into by the union delegate were held not to change the contracts of the workers unless it should be established that the agent was authorized so to act by the employees involved in the action. This was held not to be shown by evidence that in prior seasons all dealings with the employees had been carried on through such delegates.

The problem is today of less significance because most agreements expressly reserve power to modify or alter the terms, or set out the method by which they may be changed or terminated. Therefore, the individual employee's rights are never absolute, but are subject to the condition subsequent that they may be divested if the union and employer modify the terms of the collective agreement. Such a power may likewise be assumed by the courts to be impliedly reserved where there is no language on which to base an express reservation. Since the very nature of the agreement is such that the union must have power to adjust the terms, and since the general purpose of the agreement would be fulfilled by such a reservation, it would be sound to contend that each individual takes his rights under the contract subject to the possibility of subsequent modification. This rule would be applicable no matter which approach is adopted by the courts.

Often in a suit by an employee for damages or for specific performance of an agreement, the employer has advanced as a defense the argument that the employee has himself modified the agreement. This

[34] Hartley v. Brotherhood, 283 Mich. 201, 277 N. W. 885 (1938). *Also see* Burton v. Oregon-Washington R. & Nav. Co., *supra* note 27.

[35] Donovan v. Travers, 285 Mass. 167, 188 N. E. 705, 707 (1934).

[36] By dictum in the Huston case, *supra* note 16.

[37] 39 F. (2d) 348 (C. C. A. 9th, 1930).

again involves policy considerations, as well as abstract legal principles. If each individual employee is allowed the right to modify the agreement for himself, the collective contract would be reduced to a nullity. Furthermore, the individual employee, in altering the contract, would again be in the disadvantageous bargaining position which the right to bargain collectively is designed to correct. Economic coercion would make it comparatively easy for the employer to form individual contracts relegating the collective agreement to a position of legal ineffectiveness.

Nonetheless, the courts have held that the employee may modify the agreement. The worker "may forego his opportunity for benefits under that contract and continue to work under another agreement with his employer and accept the compensation stipulated in the agreement."[38] In so holding, the Washington court seems to have felt that its conclusion was a necessary corollary of the third party beneficiary doctrine, holding that under the beneficiary rationale the employee need not accept the benefits bestowed upon him. Theoretically this analysis may be sound, since a donee may refuse to accept a gift, but it is very difficult to believe that a worker would voluntarily refuse to accept an increased wage scale, the benefit bestowed in the Washington case.

A similar approach was used in *Langmade v. Olean Brewing Co.*,[39] which illustrates the evils of allowing such modification. The union agreement there involved contained a provision stipulating for time-and-a-half for overtime. The plaintiff, after working overtime, asked for the additional compensation and was denied it. He was informed that if he desired more money he should work in the bottling works. Upon a subsequent request for overtime pay, he was informed that if he was not satisfied with the compensation he could quit, and was finally told that if he continued in the employment of the defendant, it would be with the understanding that nothing was due him for overtime. In such circumstances the employee clearly has little opportunity to voluntarily contract to modify the agreement.

Modification by the individual employee can be justified under the usage theory, and even more easily under the agency doctrine. And in jurisdictions where the third party beneficiary doctrine is followed, the Washington theory that the benefits of the agreement may be repudiated offers a possible rationale to justify permitting individual modification. However, in *McNeil v. Hacker*,[40] the New York court adopted the third party beneficiary approach and refused to allow an employee to modify the collective agreement. The decision in that case advanced two general arguments: First, that a contract cannot be altered by one who is not a party to it; and second, that it is against

[38] Huston v. Washington Wood & Coal Co., *supra* note 16.
[39] 137 App. Div. 355, 121 N. Y. S. 388 (1910).
[40] 21 N. Y. S. (2d) 432 (1940).

public policy to allow an employee to enter into a contract which is inconsistent with the terms of the collective bargain.[41] The court relied upon the so-called "kickback" statute[41a] as a declaration of a broad general policy, and argued from that to the conclusion that an employee's promise to accept less than the agreed wage fell within its purposes. It is this last suggestion that such modifications are against public policy which is the most sound and which seems to offer a satisfactory solution to the problem. It has been suggested, similarly, that the collective agreement be viewed in the same manner as a minimum wage statute. This would prevent any modification, since the benefits provided for the employees by such an enactment may not be waived.[42]

Regardless of the theory adopted, it would appear that:

> "The tendency of the cases is pretty clearly in the direction of saying that an inconsistent agreement between employer and employee is no bar to the latter's suing on the collective bargain. Only one decision, however, adopts the rule as a rule."[43]

Many of these problems are now being adjusted by stipulating in the collective agreement that the employer will not enter into any separate contract altering the terms of the agreement.

Express contractual modification, however, has not been the only argument advanced by the employer to bar recovery by an individual employee. Accord and satisfaction and estoppel have also been relied upon to defeat the enforcement of his rights under the contract. In *Yazoo & M. V. R. Co. v. Webb*,[44] the court, although applying the usage theory and finding that the collective understanding had become a part of the individual's contract, nonetheless denied recovery, in an employee's suit for the difference between the wage paid him and that provided for in the collective agreement, on the theory of accord and satisfaction. The court held that there had been a real dispute as to

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[41] The court noted that the agreement provided that the employer would not enter into any contract with the individual employee to work for a lesser wage. *See also* Gulla v. Barton, *supra* note 12, which again denied the right to modify the collective agreement by individual contract, and further held that the employee, not knowing of the terms of the contract, could not waive them.

[41a] The policy of "kick-back" statutes is to make illegal an employee's returning, or contracting to return, any portion of his wage to his employer.

[42] Note (1941) 50 YALE L. J. 695. The writer suggests a number of possible reasons for holding modifications by employees invalid in addition to those already noted:

1. Modification is ineffective without the consent of all parties to the contract.
2. There has been no actual meeting of the minds.
3. The employee's waiver is ineffective because he had no knowledge of the benefits.
4. The union by-laws contain a contract between members and union that the members will not contract inconsistently therewith.

[43] Witmer, *supra* note 33 at page 235.

[44] *Supra* note 1.

what the employee should have been paid, and that when he accepted the checks given him in full satisfaction of his claim, he compromised and settled the dispute. The court suggested that the employee should have refused the checks and sued for the proper amount. Again it would appear as if contract law had been used to defeat the true purpose of the agreement. The impracticability of the suggestion that the employee refuse the check and sue for the proper amount is apparent.

The *Huston* case[45] from this jurisdiction is very similar, although the court employs language of estoppel. In that case the defendant employer had entered into a collective agreement containing a provision relative to wages and then hired the plaintiff under an individual contract of employment providing for a lower rate of pay. The plaintiff thereafter joined the union, but continued to accept the lower wage, taking checks designated as being full payment of his claim for wages. The court first decided that a third party beneficiary could contract independently of the collective agreement, and then held that the plaintiff was now estopped to claim the additional pay for which he sued.

These accord and satisfaction and estoppel cases actually represent an analysis of the modification problem in different terms. Like the cases involving modification, these cases could be obviated by holding that public policy prevents any waiver of the benefits conferred by the agreement.

Rights of the Union

Closely related to the problem of the individual employee's right of enforcement is the question of the collective right, the power of the union to enforce the agreement. Fundamentally, of course, the first requirement is that the courts recognize the agreement as creating a contract between the union and the employer, or at least some legally enforceable relation between these two parties. If the agreement is viewed merely as establishing a usage, it is difficult to find any ground upon which to base the union's right to maintain an action on the contract. Similarly, under the agency doctrine the union as such has no collective rights. It is only under the contractual approach, or some similar theory, that the union can hope to succeed in asserting rights as an entity distinct from its members. Nonetheless, the present status of the law has been summarized as follows:

> "Indeed in recent years decisions in any state which avoid language indicating that legal rights and obligations normally rise directly from collective employment agreements are rare."[46]

The first problem to be determined is whether or not the union itself can institute a suit. Clearly its officers, as representatives of the mem-

[45] *Supra* note 16. *See also* Note (1941) 50 Yale L. J. 695.

[46] Rice, Jr. *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572, 597 (1931).

bers, could prosecute a class action, but today in many jurisdictions, including Washington,[47] the right of a union to sue or be sued in its own name has been recognized, even though it is an unincorporated association. The Federal Rules of Civil Procedure also permit such a suit.[48]

If there has been a breach of the collective right, it is recognized that the union can sue to recover damages,[49] but again the problem becomes one of determining the proper method of measuring the injury suffered. There have been a number of interesting suggestions made as to the proper measure of recovery, based upon the purpose of the collective bargain.[50] The first suggestion is that the union is entitled to maintenance damages. Since the purpose of a collective agreement is to prevent the employer from lowering labor standards by forcing workers to compete among themselves, and also to prevent competition among employers at the expense of labor standards, the damages, under this theory, should be equal to the amount the employer benefits by failing to perform the contract. In addition to this, the union should be entitled to any special damages which it can prove.

If the employer has breached the contract by cutting wages below the union scale, and the individual worker involved does not bring suit, the union should be entitled to sue for the difference between the compensation received and that contracted for, together with such special damages as it has incurred. This standard of recovery would very effectively prevent wage-cutting.

Unions have seldom relied upon actions for damages to compensate for losses suffered by reason of employers' breaches of collective labor agreements.[51] Instead, they have turned to equity as affording the only adequate relief in such cases. For many years there was considerable doubt as to the availability to labor unions of injunctive relief against such breaches of contract on the part of employers, while organized labor itself long viewed the equity courts with suspicion, since injunctions were frequently resorted to in order to break strikes and combat other union activities. But finally, in *Schlesinger v. Quinto*,[52] a union success-

[47] St. Germain v. Bakery & C. Workers' Union, 97 Wash. 282, 166 Pac. 665 (1917); Labonite v. Cannery Workers' and Farm Laborers' Union, etc., 197 Wash. 543, 86 P. (2d) 189 (1938).

[48] Federal Rules of Civil Procedure, Rule 17; United Mine Workers v. Coronado Coal Co., 259 U. S. 344 (1922).

[49] Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905), where a union was allowed recovery on a note given to secure the employer's performance and to be applied as liquidated damages; Dubinsky v. Blue Dale Dress Co., 162 Misc. 177, 292 N. Y. S. 898 (1936).

[50] Witmer, *supra* note 33. This article includes an extensive discussion of the question of damages.

[51] The union is more concerned with specific performance of the agreement, while the individual worker is concerned with recovering back pay.

[52] Schlesinger, et al, v. Quinto, et al, 201 App. Div. 487, 194 N. Y. S. 401 (1922).

fully petitioned for an injunction. The contract involved in that case had been made between an employers' association and a union. The association passed a resolution requiring the individual employers to break their contract, under threat of a penalty. The union, through its president, sued to restrain the association from enforcing this resolution and thus breaking the collective agreement. As a defense, the employers offered all of the venerated equity principles which had proved sufficient in the past, but the court refuted each argument, restrained the breach, and ordered the resolution rescinded.

This case was a great victory for labor, and since that time unions have successfully resorted to equitable relief.[53] An illustration of the length to which courts will go in enforcing these agreements is afforded by the case of *Dubinsky v. Blue Dale Dress Co.*[54] Here again the contract had been entered into by an employers' association, but the breach was threatened by a single manufacturer. The clause litigated provided that "No member of the association shall, during the term of this agreement, move his shop or factory from its present location to any place beyond which the public carrier fare is more than 5 cents." The defendant manufacturer secretly moved his entire plant to Archbald, Pennsylvania, and also effectively locked out his union employees, which constituted a violation of another provision of the contract. The court ordered the defendant to move back into New York and to rehire all its former union employees. It is also of interest that a referee was appointed to compute the damages suffered by the plaintiffs. This was an unusual exercise of the equity power when one recalls the normal reluctance of a court to order an act to be done outside of its jurisdiction. But although this argument was presented, the court declared that it had power to issue the decree because the parties were all before the court and the company was a New York corporation.

The propriety of injunctive relief for labor unions has, of course, been questioned. The older cases, and even recent ones in some jurisdictions, follow the arguments of *Schwartz v. Wayne,*[55] holding that an injunction will not lie to compel an employer to refrain from breaching his contract with a union. It is also possible that even a liberal court, which recognizes the propriety of granting injunctive relief in such cases, may deny such relief on the ground that the union is not the proper party to bring the suit. Thus in an action for a mandatory injunction to compel reinstatement of employees discharged in viola-

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[53] Wassersteim v. Beim, 163 Misc. 160, 294 N. Y. S. 439 (1937); Goldman v. Cohen, 222 App. Div. 631, 227 N. Y. S. 311 (1928).

[54] 162 Misc. 177, 292 N. Y. S. 898 (1936).

[55] Schwartz v. Driscoll, Acting Circuit Judge, 217 Mich. 384, 186 N. W. 522 (1922).

tion of an agreement, the New Jersey court held[56] that the union could not ask for this relief, since the controversy was one solely between the discharged employees and the employers. This decision is, however, subject to some criticism.

The importance to a union of being able to sue for an injunction cannot be denied.

> "If the union has not the right to invoke the aid of a court of equity to prevent the unlawful violation of a contract * * *, then such a contract loses much of its force, and the rights of collective bargaining are narrowed, and the economic benefits to the community from collective bargaining to a great extent lost."[57]

This very fact constitutes a strong argument in favor of granting such relief in actions to prevent violation of labor contracts.

The final form of relief, that of the declaratory judgment, is also available to a labor union, and thus it may obtain a determination as to the validity and interpretation of a particular agreement.[58] It thus appears, then, that our judicial system today provides a number of methods by which unions and their members may enforce their rights under collective labor agreements. This victory for labor was won, however, only after the innumerable defenses advanced by defendant employers had been met and refuted.

DEFENSES

The defenses which have been advanced by employers fall into definite patterns. Naturally there are often special facts and circumstances which may be validly urged by an employer as a defense to a particular action, but our concern here is with the more typical defenses, which have been relied upon to defeat enforcement of collective labor contracts.

The union's lack of capacity to contract was one of the earliest objections raised to defeat the validity of the labor agreement as a contract between the union and the employer. Since the union was not incorporated, it was not an entity and therefore could not, in the eyes of the law, make a contract. An agreement between an employers' association and a union was therefore described as follows:

> "Nominally it was between the two international associations. But really it could not have been so, because each of said associations lacked juristic personalty. So far as there was any real contract at all, it must have been between the individual members of the different local associations."[59]

[56] Christiansen et al. v. Local 680, 126 N. J. Eq. 508, 10 A. (2d) 168 (1940). *See also* Milk Wagon Drivers' Union v. Associated Milk Dealers, 42 F. Supp. 584 (N. D. Ill., 1941).

[57] Goldman v. Cohen, *supra* note 53.

[58] In the *Christiansen* case, *supra* note 56, the court recognized that the union was entitled to a declaratory judgment as to the validity of an agreement.

[59] A. R. Barnes & Co. v. Berry, 169 Fed. 225 (C. C. A. 6th, 1909).

Modernly, of course, this defense has to a large extent been repudiated. With the recognition of unions by national and state labor laws as proper bargaining agencies, their ability to contract has also been conceded.[60] Likewise, the recognition by both federal and state courts of the right of such groups to sue and be sued in the same manner as if incorporated has done much to establish their contractual capacity.

The defense of lack of consideration was perhaps more important as an impediment in the way of unions and individual employees seeking to enforce their rights under collective labor contracts. If the view is adopted, as under the usage theory, that the only contracts which exist are those between the individual employees and their employer, this problem at once arises because the normal contract of employment provides for no definite period of hiring. Therefore it is terminable at will. Or if the understanding is viewed from the collective angle, there is still no promise on the part of the union to supply employees, and it can therefore be argued that there is lack of consideration.[61]

This apparent difficulty has by now been generally removed by the willingness of most courts to find consideration in a variety of circumstances. Also, in the usual collective agreement there are certain covenants given by the union which can easily be held to afford consideration. The promise not to strike or to participate in any type of labor disturbances for a set period of time, not to ask for wage increases,[62] and similar undertakings can be pointed to.[63] The privilege of using the union label and holding out one's product as made by a union firm has also been held to be sufficient consideration.[64] *Gord v. F. S. Harmon & Co.*,[65] a Washington case, is an interesting example of the courts' attempts to read consideration into agreements of this sort. The workers in that case had been out on strike, and the controversy seemed impossible of settlement. It was at last agreed, however, that they would refer the problem to the Pacific Northwest Regional Labor Board, that its decision would be final, and that its determination as to wages was to be retroactive to the day of beginning work. It was this final stipulation that the employer later attempted to evade, and the defense of lack of consideration was advanced. The court, rejecting the employer's contention, found consideration in the employees' returning to work upon the execution of the agreement. This, being beneficial to the employer, was held sufficient to make the agreement binding.

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[60] McNally v. Reynolds et al., 7 F. Supp. 112 (W. D., Wash., 1934).

[61] Christenson, *Legally Enforceable Interests in American Labor Union Working Agreements*, 9 IND. L. J. 69, 73.

[62] Gilchrist Co. v. Metal Polishers, etc., Union, 113 Atl. 320 (N. J. 1919).

[63] 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940) Ch. 10, § 160.

[64] Gulla v. Barton, *supra* note 16.

[65] 188 Wash. 134, 61 P. (2d) 1294 (1936).

The *Cross Mountain Coal Co.* case[66] also exemplifies the liberality of some courts in finding sufficient consideration for an individual employment contract, under the usage theory, from the fact that the employee has worked under the agreement and is still willing to continue performance of it. Finally, a liberal court may simply find an implied duty on the part of the union which will afford sufficient consideration for the employer's undertaking.

> "While it is true that there is no express agreement on the part of the union to furnish labor at the prices and under the terms and conditions prescribed in the contract, its very purpose and object was to prescribe terms under which the members of the union would work and the contractors would employ. It was therefore, we think, a necessarily implied term of the agreement that the union, its officers and members, would collectively abide by the terms of the agreement, and would not collectively or as an organization exercise any right or do any act it or they might otherwise lawfully exercise or do, which was in conflict with any of the terms of the agreement; and that the union would enforce the contract to the extent of its powers over its members under its constitution and by-laws. Clearly, we think, what the contractors were bargaining for, and what they obtained under the agreement was freedom from industrial dispute, strike or collective adverse action on the part of the union, its officers, and its members during the term covered by the agreement."[67]

An even more difficult problem for the unions, however, was to establish their right to injunctive relief in the face of the argument of lack of mutuality of remedy or of obligation. It was argued that an employer could not obtain an injunction against an employee to compel him to continue his employment or to restrain him from breaching his contract of employment. Therefore, since this form of equitable relief was denied to the employer, it should also be denied to the employee.

Until the decision in *Schlesinger* case[67a] this argument was thought to be insurmountable, apparently not only by the employers but by the union as well, but that opinion effectively disposed of the contention. The position of the court may be illustrated by the following quotation from its opinion:

> "Two organizations, one composed of employers and the other of employees, have entered into an agreement. Each had power through the consent of its members to enter into a binding obligation in their behalf. * * * This contract has mutual obligation binding on the parties thereto. Each party knows

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[66] *Supra* note 10.

[67] Harper v. Local Union No. 520, International Brotherhood of Electrical Workers, 48 S. W. (2d) 1033, 1040 (Tex. Civ. App., 1932).

[67a] *Supra* note 52.

> the obligation that it has assumed and the consequence of failure or refusal to perform those requirements. Through its control of its members it can compel performance. Under such circumstances a decree of a court of equity can be enforced against either party in favor of the other. * * * An organization, having such power to require performance by individual members, can through its officers be compelled to exercise that power. There is in this contract mutuality of obligation, and there is also a mutuality of remedy for its enforcement."

Since the doctrine of mutuality of obligation and remedy has been seriously modified, if not completely discarded, this argument presents little difficulty in the enforcement of collective labor agreements.[67b] Furthermore, employers are now also often allowed injunctions, thus creating actual mutuality of remedy.

Another equitable defense, closely related to lack of mutuality, arose out of the general reluctance of the courts specifically to enforce contracts for personal services.[68] The relationship between employer and employee is such that the courts long felt it undesirable to compel an unwilling employer or employee to continue performance of the employment contract. But modernly, the courts have circumvented the difficulties in issuing an injunction for specific performance of a contract for employment by ignoring the personal aspects thereof and treating it solely in its collective aspect.[69] Therefore it is possible for an employer to obtain an injunction against a union to prevent it from breaching its contract, and as a necessary corollary, the union has the same right against the employer. This approach of the courts has been termed the "lump of labor" doctrine, since it views the contract not as the employment of specific persons but as an undertaking by the union relating to the hiring of "unspecified persons from a specified group."[70]

It should also be noted that it has been claimed that there is an adequate remedy at law, that no injunction should issue because the services involved were not unique,[71] and, finally, that to enforce the contract would require too constant surveillance by the court. The irre-

[67b] For an interesting discussion of the problem of mutuality see Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Hill, *supra* note 16.

[68] Schwartz v. Driscoll, *supra* note 55.

[69] This argument was raised in the *Harper* case, *supra* note 67, and the court held that in its collective aspects it was not a contract of personal employment, since the employer and the union do not contract for the employment of particular workers. Also in Greater City Master Plumbers' Assn., Inc., v. Kahme, 6 N. Y. S. (2d) 589 (1937), the court, in discussing the right to compel the union to perform the contract, held that it was not forcing individual employees to work. As individuals they were free to act as they desired. It was only the union that was being restrained.

[70] Witmer, *supra* note 33, at page 204.

[71] Stone Cleaning & Painting Union v. Russell, 38 Misc. 513, 77 N. Y. S. 1049 (1904). This case, of course, is no longer the rule in New York, as subsequent cases have held that the injunction will be issued.

parable nature of the injury and the inadequacy of damages have, of course, now been conceded by the courts.[72] The other two contentions are likewise of less importance today because of the courts' general attitude toward these agreements.[73]

Occasionally, the employers have advanced the contention that the collective agreement is void because formed under duress. The outstanding example of this is found in the *Wassersteim* case.[74] The plaintiff employees had called a strike during the rush season, at which time it was imperative for the employer to be able to continue his production. He therefore executed a collective agreement with his workers, but upon the termination of the busy period he refused to perform and attempted to defend an action for an injunction on the ground of duress. The court, finding that the strike had been validly called and conducted, refused to invalidate the agreement as one entered into under duress.

Another defense which has been asserted by employers and unions alike is that they have become dissatisfied with the terms of the agreement, or that conditions have changed, rendering it impractical to enforce the contract. The courts have refused to recognize this as a valid defense on behalf of either party to the agreement.[75]

It has often been contended that such agreements are invalid because in violation of the anti-trust law for one reason or another. The closed shop clause is most often subjected to this attack, but since the general validity of such a provision will be discussed later, its relation to the anti-trust law will not now be considered. This defense has also been asserted against other provisions peculiar to the particular cases to which they give rise, but since they are not normally found in collective contracts, they need not be considered here.[76]

Another defense which has been advanced is that a plaintiff employee has failed first to exhaust his relief under the agreement, as through

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[72] Goldman v. Cohen, *supra* note 53.

[73] Witmer suggests one other problem which should be noted, and that is the difficulties that will arise where the contract provides specifically that the employer is to take a definite number of employees. Forcing an unwilling employer to hire these men is, of course, contrary to normal equity practice. Nevertheless, that is the procedure followed by the N. L. R. B. in reinstatement cases, and Witmer suggests that the approach of the Board may prove helpful to the courts in their search for a solution of the problem.

[74] Wassersteim v. Beim et al., *supra* note 53.

[75] Greater City Master Plumbers' Assn., Inc. v. Kahme, *supra* note 69, and Harper v. Local Union No. 520, *supra* note 67. A practical solution for this problem has been found in making these collective labor agreements for shorter periods of time and providing methods for their modification if changes in conditions should make such a course necessary or advisable.

[76] For an example, *see* National Assn. of Window Glass Mfg. et al v. U. S., 263 U. S. 403 (1923). The general question of the anti-trust laws and the labor movement constitutes another entirely distinct field, with a considerable literature of its own.

appeals to various types of grievance committees. This would seem to be a valid defense and should be sustained if the employee can obtain adequate relief by resorting to the established agencies. Finally, the fact that an arbitration award has been rendered which determined the matter adversely to the employee or party plaintiff has also been relied upon to bar recovery.[77]

RIGHTS OF THE EMPLOYER

Although many of the defenses which an employer may offer, such as the last two noted above, are valid and may effectively defeat an action by a union or an individual employee, yet our general conclusion must be that a collective bargaining agreement does create rights for labor, both collectively and individually, which have been recognized and enforced by the courts. But accompanying those rights are obligations imposed upon the unions and individual employees, which in turn create rights in the employers with whom they contract. And these, too, have now received judicial sanction.

The problems confronting an employer when he attempts to bring a suit upon a collective agreement are quite similar to those which we have just considered in discussing the rights of unions and individual employees. There is the right of the employer as an individual and, less often, the collective right of an employers' association, which is becoming a matter of ever increasing importance. If the agreement has been entered into by an employers' association, the courts have generally found that the individual employer is bound by the agreement on the theory of agency,[78] and by the same token, he is enabled to assert rights created by the contract.

Damages have proved to be an even less satisfactory remedy for employers than for employees and their unions. There are very few cases in which an employer has obtained damages from an individual employee, and the difficulties he would have in collecting a damage judgment, together with the difficulty in finding some theory upon which to hold the employee obligated, are probably largely responsible for this situation. But equally important is the difficulty of proving that the particular employee has been guilty of any breach of the con-

[77] Hamilton, *supra* note 11.

[78] Blum & Co. v. Landau, 23 Ohio App. 426, 155 N. E. 154 (1926), where the court also found a subsequent ratification of the agreement. In Dubinsky v. Blue Dale Dress Co., *supra* note 49, damages were allowed against an individual employer for breach of a contract formed by an employers' association of which he was a member. In A. R. Barnes & Co. v. Berry, *supra* note 59, the court found that the individual employer had ratified the action of the association.

tract himself, unless he has actively participated in the wrongs complained of, or voted to breach the contract.[79]

There is particular difficulty in establishing a basis upon which to hold an individual employee liable if the third party beneficiary rationale is adopted. As has already been mentioned, it is very difficult to find that such a beneficiary has also become an obligor under a contract entered into for his benefit by the union and the employer. Of course, the agency theory offers a solution to this problem, because as principal the employee clearly would be liable. Likewise, the usage doctrine provides a method of holding the individual worker responsible for the breach of his own contract of employment.

Even though some legal theory might be evolved by which the employer could recover damages against the employee individually, there is still the practical consideration that such relief is apt to be very inadequate. If damages are sought, an action against the collective group would seem to be more likely to achieve the desired end. It is here that employers have themselves run into the objection, which they long asserted against actions by unions to enforce these contracts, that a union is a voluntary unincorporated association. In the more liberal jurisdictions, of course, this is now solved from the procedural standpoint, and an employer can sue a union as such. Nevertheless, there is still a great deal of controversy over the financial irresponsibility of labor unions, and much effort has been put forth in an attempt to require that they be incorporated.

Even when damages are allowed to an employer as against a union, there is ever present the problem of the proper measure of recovery. In an action by the Netherland-American Steamship Company against a longshoremen's union,[80] the plaintiff employer sued to recover damages caused by a strike and the refusal of the union workers to unload one of its ships. The recovery was limited to what it would have cost to unload the ship at the additional wage demanded, denying the demurrage charges for which the employer asked. The case has been approved as applying the proper measure of recovery, i. e., the unavoidable loss actually caused by the strike. From the standpoint of the employer the purpose of the agreement was to get men to work for it at the stipulted wage. Breach of the contract would therefore result in a definite loss, either a measurable loss of business, or else increased cost through having to pay the wage demanded. Logically, therefore, the employer's

[79] Whiting Milk Co. v. Grondin, *supra* note 17, where an employer sued an individual employee; Note (1938) 51 HARV. L. REV. 520, 528.

[80] Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benevolent Soc. et al., 265 Fed. 397 (E. D. La., 1920). It is of interest to note that here the union advanced the defense of lack of mutuality.

recovery should be limited to this loss actually suffered.[81]

Because of the peculiar nature of a collective labor agreement, equitable relief seems more satisfactory for employers as well as for the unions and individual employees, and an employer is allowed to enjoin the breach of an agreement by the union with which he has contracted. The employer, however, has another difficulty to meet when he sues for an injunction. Usually the action of the union which he is attempting to enjoin is a strike in breach of the terms of the contract or to compel a change in those terms. There is available to the union in such cases the defense that it is against public policy to enjoin the strike. Although some courts have upheld this contention, others have granted the injunction on the theory of thereby giving mutuality of remedy with respect to the agreement.[82]

When an action is brought against a union to restrain it from calling a strike or to compel it to perform its contract, there would seem to be no difficulty in granting the relief sought. However, when the striking employees include non-union laborers as well as union members, can it be said that the non-union workers are striking in violation of any agreement? Also there is the further question whether a union is liable for the action of its members in striking without its approval.[83] It is in these situations that the common law approaches attempted to be applied by the courts fall far short of providing an adequate solution. As to the latter situation, the answer may perhaps be found in the fact that a union is presumed to have disciplinary powers over its members, and consequently it is fair to hold the union liable for their conduct. And although the striking of non-union employees without the aid and assistance of a union is infrequent, still these are problems which are presented and which seem to require that the courts adopt some new legal approach for their solution. The development of powerful minority unions antagonistic to the aims and interests of the majority bargaining units in our various industrial establishments will probably force these problems into even sharper relief.

With the judicial recognition of the right of the employer to obtain a declaratory judgment as to the validity of a collective bargaining agreement, his rights for the enforcement of the collective agreement are rounded out and become as complete as those of the union.[84] In the

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[81] Witmer, *supra* note 33.

[82] Greater City Master Plumbers' Assn., Inc. v. Kahme, *supra* note 69, where the court allowed the injunction. *Cf.* Nevins, Inc. v. Kasmach, 279 N. Y. 323, 18 N. E. (2d) 294 (1938); *but see* Nevins, Inc. v. Kasmach, 300 N. Y. S. 64 (1937), a memorandum opinion holding that enforcement of a covenant not to strike is against public policy.

[83] Note (1938) 51 HARV. L. REV. 520.

[84] F. F. East Co., Inc. v. United Oystermen's Union 19600 et al., 130 N. J. Eq. 292, 21 A. (2d) 799 (1941), reversing 128 N. J. Eq. 27, 15 A. (2d) 129 (1940).

actions brought by the employer, the union, of course, asserts many of the defenses already noted. The reasons for denying the validity of such arguments when advanced against the union apply equally when the union is contending for their applicability.

(To be continued.)

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The law school embarked on another school year without the services of four of its faculty members, who have been called by the Government for various governmental positions. On leaves of absence from the faculty are Professors Alfred E. Harsch, John W. Richards, Warren L. Shattuck, and John B. Sholley.

Professor Harsch was the first member to leave the faculty and has been appointed rent director of the Puget Sound Defense Rental Area with offices in Seattle.

Professor Richards has been commissioned a lieutenant senior grade in the United States Naval Reserve and is engaged in active duty as an instructor at the Navy Pre-Flight School at Iowa City, Iowa.

Professor Shattuck has been called by the United States Army and is now a first lieutenant in the infantry. He is stationed at Fort Douglas, Utah.

Professor Sholley is serving as state price attorney with the Office of Price Administration and has his office in Seattle.

The classes formerly conducted by the absentees have been divided among the remaining members of the faculty of the law school.